Supreme Court, U.S.
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No. 09-933

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In The
Supreme Court of the United States

JANEEN MILLER; JAMES MAHOOD,
Petitioners,

v.

KRISTEN NICHOLS; BRENDA HARVEY, in her capacity as Commissioner of Maine Department of Health and Human Services,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the First Circuit misapplied Maine's law of issue preclusion in dismissing the Plaintiffs' claims for violations of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and First Amendment Associational and Expressive rights when those issues were not expressly decided by the State Court's Decision in a family law matter.

2. When a party is compelled to introduce facts establishing bias into evidence in a State Court family law proceeding which precludes consideration of any claim other than family law claims does the introduction of those facts, when they are not subsequently specifically determined by the State Court proceeding, preclude a Federal Court under the doctrine of issue preclusion from exercising jurisdiction for violations of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and First Amendment Associational and Expressive Rights?

3. Does 42 U.S.C. §1983 operate to create a private right of action under HIPAA when an State Caseworker acting under the color of state law illegally discloses confidential and privileged medical information?

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OPINION BELOW

The opinion of the First Circuit Court of Appeals is reported at *Miller v. Nichols, et al.*, 586 F. 3d 53(1st Cir. 2009). The District Court decision was reported in *Miller v. Nichols, et al.*, 592 F. Supp. 2d 191 (D. Me. 191). The decisions are reproduced at Appendices A and B respectively.

JURISDICTION

The First Circuit filed its decision on November 4, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Circuit Court's decision on a Writ of certiorari.

STATUTORY PROVISIONS INVOLVED

29 U.S.C §794

No otherwise qualified individual with a disability in the United States, as defined in section 705(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

42 U.S.C §1983

Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or mission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. §1320d-6

Wrongful disclosure of individually identifiable health information

(a) Offense

A person who knowingly and in violation of this part—

(1) uses or causes to be used a unique health identifier;

(2) obtains individually identifiable health information relating to an individual; or

(3) discloses individually identifiable health information to another person,

shall be punished as provided in subsection (b) of this section.

42 U.S.C. §12132

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

For Janeen Miller there are no there are no truer words than those of Mary Chapin Carpenter, "Everything she got, she got the hard way." Ms. Miller was in college when she was involved in an automobile accident, which led to a post-traumatic stress disorder. As Ms. Miller's mental health deteriorated, she was compelled to leave college. At first, she tried to work but her condition interfered, and she continued a downward spiral that eventually left her homeless for intermittent periods of time. By the time, she was 30, Ms. Miller had little hope for anything approaching a normal life.

Then, after several years in the wilderness, when Ms. Miller was 37 years old, she met Jim Mahood. Mr. Mahood was older and had raised a family and made a successful business in Rhode Island. He was in Maine working on a new business venture.

Ms. Miller and Mr. Mahood began a loving and supportive relationship and eventually conceived a child. On February 19, 2004, Ms. Miller gave birth to G.M.

During her pregnancy, Ms. Miller had researched everything she could on raising children. She read articles on the Internet and discussed her findings with her prenatal physician. Ms. Miller read, was told, and believed that the best nutrition for a newborn child is mother's breast milk.

Unfortunately, Ms. Miller is painfully thin, almost cachectic. Ten months after G.M. was born, Ms. Miller took the child for a check-up with Dr. Sze. Dr. Sze expressed a concern that Ms. Miller, because of her light weight, was not providing enough breast milk and ordered Ms. Miller and Mr. Mahood to feed G.M. formula. If not, Dr. Sze threatened to call Maine Department of Health and Human Service.

Ms. Miller and Mr. Mahood were horrified. They took G. M. to Dr. Pearsall of Dover-Foxcroft for a second opinion. Dr. Pearsall noted that G.M. "appears slightly thin, but not emaciated." Dr. Pearsall came up with a plan to supplement Ms. Miller's breast milk with formula, cereal, and strained vegetables. The program was successful. Within a week, G.M. had gained a pound, within a month two pounds, within five months, G.M. had gained five and a half pounds. Dr. Pearsall repeatedly told Ms. Miller and Mr. Mahood that G.M. had gained adequate weight from the last appointment. Unfortunately, even with her weight gain, G.M. still was in the lower percentiles of her age groups by height and weight.

Ms. Miller and Mr. Mahood continued to have G.M. treated by Dr. Pearsall through October 27, 2005. On December 6, 2005, Ms. Miller and Mr. Mahood were living in Portland and arranged for G.M.'s treatment to be switched to Dr. Rovner who was located in the Portland area. Dr. Rovner examined G.M. on December 6, 2005.

Shortly after that visit, G.M. began to show flu-like symptoms. She was experiencing diarrhea and seemed to have had some behavioral changes. Ms. Miller and Mr. Mahood called Dr. Rovner a couple of times and each time they were told that Dr. Rovner would examine G.M. at her regularly scheduled visit. Unfortunately, two winter snowstorms postponed the visits.

On December 25, 2005 at about 5:45 pm G.M.'s body went rigid, her eyes rolled back in her head and she stopped breathing. Ms. Miller was hysterical and yelled for Mr. Mahood to call 9-1-1. By the time the ambulance attendants arrived G.M. was breathing fine. The ambulance attendants checked G.M out and thought her well enough that they advised that they did not intend to transport G.M. to the hospital Ms. Miller insisted that they do so and G.M. was eventually taken to Southern Maine Medical Center.

At the Hospital Dr. Hayman, who was just out of residency, examined G.M., and because her height and weight were in the lower percentiles, made a diagnosis of failure to thrive. In treating G.M., Dr. Hayman found Ms. Miller difficult and "beyond the norm." Subsequently, though Dr. Hayman admitted that Ms. Miller had not refused treatment for G.M.

Dr. Hayman called Maine Department of Health and Human Services.

On December 27, 2005, Maine DHHS sought and was granted a preliminary protection order. The Court, as required by Maine Law, scheduled the matter for an immediate review to determine whether there was jeopardy. On the recommendation of Court appointed counsel, with DHHS' representation that it needed the order to provide Ms. Miller and Mr. Mahood with the necessary services for reunification, Ms. Miller and Mr. Mahood agreed to a finding of jeopardy and entry of a protective order.

After entry of the protective order, Ms. Miller and Mr. Mahood voiced concerns at team meetings as to whether G.M. should receive any more vaccinations. The concerns were based, in part, on religious beliefs. One vaccine is made from monkey cells and Ms. Miller did not believe God wanted her child injected with parts from other species. Other vaccines, Merck's MMR or Pro-Quad are made from stem cells of aborted fetuses, and Ms. Miller does not believe in abortion. When the Department advised that it intended to vaccinate G.M. over Ms. Miller and Mr. Mahood's objection, Ms. Miller and Mr. Mahood sought and received a TRO to stop the vaccinations. The Department subsequently sought to lift the TRO and advised Ms. Miller and Mr. Mahood that if they did not withdraw their opposition the Department would seek to terminate their parental rights. Ms. Miller and Mr. Mahood refused to withdraw their objections and on October 16, 2006, just 10 days after the TRO hearing, the Department filed its Petition to Terminate Parental

Rights. The reason that termination was sought, according to State Caseworker Ms. Nichols was G.M.'s diagnosis of failure to thrive and the fact that Ms. Miller could possibly be schizophrenic.

Leaving aside the issue of Ms. Miller's mental health, Mr. Mahood advised Ms. Nichols that he was neither schizophrenic nor even diagnosed with any kind of mental illness. Ms. Nichols then made it a condition for reunification that if Mr. Mahood wanted G.M., he would have to sever his relationship with Ms. Miller.

Thereafter, the Department did nothing to re-unify the family and moved forward with the petition. The matter was scheduled for trial in August of 2007, and consumed eight days over the next four months.

By Maine Rules of Civil Procedure, Rule 80(b) Parties in a family law matter are prohibited from raising any claims other than those relating to the family law issue immediately before the court in any family law proceeding.

During the course of the trial, Ms. Nichols was asked:

> "Q. Are you familiar with the Americans with Disabilities Act?
> A. No.
> Q. When you went to the Department, did they train you with regards to your responsibilities to your job tasks and how you work with people?

A. Yes.

Q. Were you ever trained that, when you face someone that has a mental illness or a mental health issue that you need to make some kind of reasonable accommodations to work with them?

A. Yes.

Q. Can you tell me what reasonable accommodations you made in working with Ms. Miller?

A. In the first year, I tried very hard. We did have family team meetings. We did – I had a lot of conversations with her. We met frequently. I did converse. We did talk about issues.

Q. Family team meetings are something that you do every time you have this type of situation, right?

A. Right.

Q. Nothing different that you did for Ms. Miller than you did for anyone else.

A. Right.

At the close of the trial, the Court stated that there was insufficient evidence to terminate parental rights.

Nonetheless, on January 23, 2008 the Court entered an Order terminating the parental rights of Ms. Miller and Mr. Mahood. Nowhere in that Order is there any discussions, much less decisions concerning the ADA, Section 504 of the Rehabilitation Act of 1973, First Amendment Religious Rights, Privacy Rights, or First Amendment Associational Rights.

On February 1, 2008, Ms. Miller filed Requests for Additional Findings of Fact and Rulings of Law. Mr. Mahood filed his requests on January 30, 2008. On February 7, 2008, the Court issued its Order on the various post-judgment requests. Again, the Court's Order is entirely devoid of any mention of the issues raised in the Plaintiffs' Federal Court complaint, which is the subject matter of this action.

Ms. Miller and Mr. Mahood appealed to the Law Court. On August 12, 2008, the Court issued a one-paragraph decision. It too is entirely devoid of any discussion or decision concerning the claims presented in the Plaintiffs' Federal Court Complaint.

On October 20, 2008, Ms. Miller and Mr. Mahood filed their Federal Court Complaint alleging that the actions of the Maine Department of Health and Human Services violated their Federal protected rights under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and their Associational and Expressive Rights protected by the First Amendment.

The Federal District Court noted that the facts as alleged were troubling but nonetheless assumed that the State Courts must have dealt with the issues raised by the Plaintiffs' complaints otherwise the termination proceedings would have violated Ms. Miller and Mr. Mahood's due process rights.

Additionally, Ms. Miller alleged that the State Caseworker's disclosure of her mental health records to a doctor who was analyzing the child for vitamin D deficiency was a violation of her rights protected by

HIPAA. Since no State or Federal official took action to protect those rights, Ms. Miller claimed the right to do so under 42 U.S.C. §1983.

The First Circuit concluded that based on this Court's 1930 decision in *Grubb v. Pub. Util. Comm'n of Ohio*, 281 U.S. 470, 477-78 (1930), that the law of issue preclusion did not require that the issue actually have to be joined, only that it could have been joined, in order for the doctrine of issue preclusion to apply.

Trapped between the State Court, which precluded the raising of the civil rights issues by rule, and the Federal Court's denouement that the issues must have been raised in the State Court proceedings, Ms. Miller and Mr. Mahood turn to this Court asking only leave to present their claims of State violation of their civil rights to the Federal Court.

REASONS FOR GRANTING CERTIORARI

On November 4, 2009, the First Circuit Court of Appeals denied Janeen Miller and Jim Mahood's Appeal from the Federal District Court of Maine's Decision and Order dismissing their claims for violations of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and 42 U.S.C. §1983.

The question on appeal was not whether the complaint stated a claim for civil rights violations, but whether the Federal Court was precluded from

hearing those claims because of a Maine Family Court Decision.

The Plaintiffs assert that the First Circuit erred when it concluded, that even though neither the underlying facts nor any discussion of the civil rights issues appear anywhere in the State Court Decisions, that the doctrine of issue preclusion applied because the issues must have been decided otherwise the State's action would be improper.

The First Circuit Court's decision is based upon an assumption that the civil rights issues were considered in the context of the Maine District Court's jeopardy order. To deny individuals who come before the Court seeking vindication of constitutional and civil rights even the opportunity to be heard based on an assumption is an error.

A. The Law of Issue Preclusion

Under Title 28 U.S.C. §1738, the Federal Full Faith and Credit Statue, a "Federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. Of Education, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L.Ed 2d. 56 (1984).* As such, the preclusive effect of any state court judgment is determined under the law of the State in which the judgment was rendered. *In re: Sonus Networks, Inc., 499 F. 3d. 47, 56 (1st Cir. 2007).* Since the judgment upon which the First Circuit relied was rendered by a Maine Court, Maine Law controls.

Maine Law provides that a prior judgment will only operate to preclude consideration of an issue if:

> 1) the identical issue was determined by a prior final judgment, and;
> 2) the party estopped has a fair opportunity and incentive to litigate the issue in a prior proceeding.
> *Cline v. Maine Coast Nordic, 1999 Me. 72, 728 A. 2d 686 (Me. 1999); Perry v. H.O. Perry & Sons Co., 1998 Me. 131, 711 A. 2d 1303; State v. Hughs, 2004 Me. 141, 863 A. 2d 266 (Me. 2004).*

Further, Maine Law provides that the party asserting issue preclusion has the burden of demonstrating the specific issue was actually decided in the earlier proceedings. *Macomber v. MacQuinn-Tweedie, et al., 2003 Me. 12; 834 A. 2d 131 (Me. 2003);* c.f. 18 Charles Alan Wright, et al., *Federal Practice and Procedure*, §§4420 516-518 (2nd ed. 2002).

To prove that an issue has been precluded by a prior judgment, the moving party must show not only that the specific issues were decided by the prior judgment, but also that the findings, relating to the specific issues upon which preclusion is sought, were essential to that judgment. *Beale v. Chisholm, 626 A. 2d 345, 347 (Me. 1993).* "If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded... Restatement Second of Judgments §27, Comment h (1982)" *Beale, supra at 347.*

That position is not unique, Wright, Miller & Cooper in their treatise on *Federal Practice and Procedure* note that there is a critical distinction between findings essential to a judgment, and those that are not, for purposes of issue preclusion. If a finding is not essential to the judgment then it does not have a preclusive effect in subsequent litigation. Wright, Miller & Cooper, *Federal Practice & Procedure* §§ 4421(1981).

To prevail on its claim for dismissal the State must not only prove that the specific issue upon which it seeks preclusion was actually determined by the underlying judgment, it must also prove that the specific issue was essential to the judgment.

B. The Specific Issues were Never decided by the State Court Judgment

The underlying judgment, upon which the State seeks to rest its preclusion claim, is a judgment terminating the parental rights of the parents. In arguing that the issues concerning the Plaintiffs' civil rights claims were decided by the State Courts, the State argues that the Plaintiffs vigorously litigated the issues before the court. The Plaintiffs did raise issues concerning the ADA and HIPAA violations before the Court.[1] However, the fact that the issues were vigorously litigated does not give the judgment preclusive effect.

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[1] The issues were exposed during cross-examination and raised in the context of witness bias.

In *Beale v. Chisholm, 626 A. 2d 345 (Me. 1993)*, the Plaintiffs argued that a Defendant's criminal conviction for manslaughter precluded the Defendant from challenging the issue of negligence in a subsequent civil proceeding. In finding that there was no issue preclusion the Court held:

> "The critical distinction for the purpose of issue preclusion between those findings that are essential to a judgment and those that are not stems from the recognition that the tribunal that decided the first case may not have taken sufficient care in determining an issue that did not affect the result, even though the parties vigorously litigated the issue, and that 'Appellate review may not be available to ensure the quality of the initial decision.' Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* §§4421 at 193(1981)." *Beale, supra* at 347 [Emphasis supplied].

The issue of whether the plaintiffs' "vigorously litigated" their civil rights claims before the State tribunal is a red herring. Vigorously litigating an issue has no bearing on whether a judgment will preclude litigation of an issue. The specific issue must actually be decided by the Court to have a preclusive effect.

Nowhere in the State District Court's January 23, 2008 Order Terminating Parental Rights is there any discussion of the ADA or Civil Rights violations

which the Plaintiffs seek to pursue in the Federal Court. If the issues were not even discussed, then it is impossible that the issues were decided by the Court's judgment. If the ADA and Civil Rights issues were not discussed and not decided by the Court's January 23, 2008 Order, then the "identical issue" was not determined by the prior judgment, and the judgment cannot operate to preclude litigation of those issues. *Gilman v. Dept. of Human Services, 1998 Me. 122, 711 A. 2d 154 (Me. 1998); Machias Savings Bank v. Ramsdall, et al., 1997 Me. 20, 689 A. 2d 595 (Me. 1997).*

After the State District Court's January 23, 2008 Order, Ms. Miller, pursuant to M.R.Civ.P. Rule 52, specifically requested that the Court make additional findings of fact and rulings of law. Within those requested findings, the Plaintiff sought that the Court determine that the Defendant Nichols knew that she had to make reasonable accommodations for Ms. Miller but had failed to do so. Ms. Miller also requested a ruling of law that Defendant Nichols had violated HIPAA. On February 7, 2008, the State District Court entered an additional page and a half Order. Once again, there were no discussions of the Plaintiffs' ADA or Civil Rights claims. In fact, the Court notes that though it has received requests for additional findings from both Ms. Miller and Mr. Mahood, the "findings and conclusions" of its January 23, 2008 were incorporated into the February 7, 2008 Order. After making a further ruling on an issue raised by the Guardian concerning the Court's failure to discuss its lack of reliance on the parents' witnesses and Mr. Mahood's claim concerning passivity, the Court concludes, "No further findings are necessary."

In concluding that it had previously made findings which supported the termination, and that no further findings were necessary, the Court limited its judgment to the issues concerning whether it found jeopardy and whether termination was in the best interest of the child. The Court's statement as to further findings, implicitly, if not explicitly recognizes that there are other issues, which the Court does not deem necessary to its judgment and which are not determined by the Court's decision.

The limitation of the finding to the conclusions germane only to the family law proceedings appears to be, as it should, standard operating procedure in Maine's District Courts. In a case involving an identical claim, that the state of Maine Department of Health and Human Services had discriminated against a mentally ill individual the presiding judge held:

> "This Court does not imply that Dr. Handler is without remedy if she can demonstrate that she was denied the benefits of the Department's reunification services or discriminated against in the provision of reunification services by virtue of a mental disability. The remedy for such a violation of the ADA-if one can be proven-does not lie within this proceeding, however. *See In re Anthony P., 84 Cal. App. 4th 1112, 1116, 101 Cap. Rptr. 2d 423, 425-26 (Cal. Ct. App. 2000)* ("[T]he ADA is inapplicable when used as a defense

> by the parent(s) in [termination] proceedings . . . . The parent 'may have a separate cause of action under the ADA based on the County's actions or inactions; such a claim, however, is not a basis to attach the [termination] order.'" (*quoting In re TorranceP., 522 N. W. 2d 243, 245 (Wisc. Ct. App. 1994))"*
> *In re D. H., State of Maine District Court, Belfast, BEL-PC-05-015.*

The position of the Maine District court is directly at odds with the decision of the First Circuit. Though the First Circuit was aware that this was the position Maine's family Courts took regarding the applicability of the ADA to family law proceedings it nonetheless held that subsequent litigation of ADA claims was barred by the doctrine of issue preclusion. The First Circuit's decision leaves the Plaintiffs in a surreal netherworld between the State and Federal systems. Each claiming that their Court cannot provide a remedy for the Plaintiff's claimed wrong.

On February 29, 2008, the Plaintiffs filed a Notice of Appeal to the Maine Supreme Judicial Court. In Ms. Miller's Brief, she argued that Ms. Nichols failure to grant a reasonable accommodation under the ADA was evidence of bias. In a four-sentence opinion, reproduced in its entirety here, the Supreme Judicial Court upheld the State District Court Judgment.

> "The parents of G.M. appeal from a judgment entered in the District Court (Portland, Bradley, J.)

> terminating their parental rights to G.M. pursuant to 22 M.R.S.A § 4055(1)(B)(2)(2007). Contrary to the parents' contentions, the court rationally could have found clear and convincing evidence in the record to its determinations that both parents are unable to protect G.M. from jeopardy and these circumstances are unlikely to change within a time reasonable calculated to meet the child's needs. See *In re Thomas D., 2004 ME 104, 21, 854 A. 2d 195, 201.* The court also rationally could have found clear and convincing evidence in the record to support its determination that termination of the parents' parental rights is in G.M.'s best interest. See *id.*; see also *In re Michaela C., 2002 ME 159, 27, 809 A. 2d 1245, 1253.* Finally, the father's argument that the Department did not engage in legitimate reunification efforts is not supported by the record."

That opinion is entirely devoid of any discussion, much less decision of the factual issues concerning the ADA and the Plaintiffs' Civil Rights Claims. There is no evidence that the Maine Supreme Judicial Court even considered the issues, which are the subject matter of the Plaintiffs' complaint. If the Maine Supreme Judicial Court did not consider the issues then, a fortiori, the issue could not have been determined by the final judgment of that Court. If the identical issues were not necessarily determined by the judgment, then

the judgment cannot have preclusive effect for those issues. *Gilman, supra*; *Machias Savings Bank, supra*.

C. The Civil Rights Issues Were Not Essential to the State Court Judgment.

Under Maine's law of issue preclusion, the issues upon which the doctrine may be invoked must be essential to the underlying judgment in order for them to preclude their subsequent litigation in a different matter.

The underlying action, upon which the State's assertion of issue preclusion rests, was the State's Petition for the Termination of Parental Rights. The issues necessary in resolving a Petition for Termination are identified in Title 22 M.R.S.A. § 4055. In relevant part, they are:

> (1) that "[c]ustody has been removed from the parent under § 4035 [child was in jeopardy][2] " and (2) that "[t]he court finds, based on clear and convincing evidence, that: [t]ermination is in the best interest of the child; and...[3][t]he parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time reasonably calculated to

[2] Though not relevant to this proceeding, it is of note that custody was removed from the parents under §4035 when the parents were promised by the State that if they agreed to jeopardy it would facilitate the return of the child. It is more than a little problematic that the State obtained custody by agreement with a woman that it subsequently claimed was incompetent.

meet the child's needs." *22 M.R.S.A.§4055(1)(A)(1)(a)& (B)(2)(a)(b)(i).*

Those three issues (1) jeopardy, (2) best interest of the child, and (3) unlikely change in circumstances, are the only issues which were essential to the State Court judgment on termination.

The issues brought in the Plaintiffs Federal Court complaint are for violations of the ADA, Section 504 of the Rehabilitation Act of 1973, and Federal Civil Rights law. Those issues were not essential to the State Court's judgment on the Section 4055 termination petition.

As such, even if this Court were to find that somehow the State Court had previously determined the issues now being raised by the Plaintiffs' Federal Court complaint, because those issues were not "essential" to the underlying State Court judgment, any determination of those issues cannot have preclusive effect.

As the Maine Supreme Judicial court held in *Beale v. Chisholm, 626 A.2d 345 (Me 1993)* if the:

> "...judgment is not dependent upon the determination, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta...Restatement Second of Judgments §27 Comment h (1982)." [internal quotation marks omitted]. *Beale, supra at 347*

Under Maine law, the only impact the State court rulings could have on the Plaintiffs' claims would be as dicta. Dicta does not have a preclusive impact.

Since any rulings which the State Court may have made on the Plaintiffs' current Federal claims were not essential to the issues necessary to terminate parental rights, those State Court determinations cannot preclude the Plaintiffs from litigating their Federal Claims.

D. The Plaintiffs did not have A Fair Opportunity to Litigate the Issues In the Prior Proceeding

Termination proceedings in the Maine State Court are governed by M.R.Civ.P.,Rule 80. In subpart (a) the Rule provides that:

> "These Rules shall apply to actions for divorce, annulment, judicial separation, separate support, and determination of parental rights and responsibilities, except as otherwise provided in this rule." Rule 80(a) M.R.Civ.P.

The determination of parental rights and responsibilities includes within it those actions for termination of parental rights. As such, the State Court proceedings upon which the State seeks to rest its claim of issue preclusion were all governed by M.R.Civ.P. Rule 80.

However, M.R.Civ.P. Rule 80 specifically prohibited the Plaintiffs from raising their ADA, Section 504, and Civil Rights claims. The rule provides:

> "No counterclaim shall be permitted in any action under this rule except for divorce, annulment, separate support or a determination of parental rights and responsibilities." M.R.Civ.P. Rule 80(b)

The Maine State Court could not consider, nor make any awards for, any of the federal claims now asserted by the Plaintiffs in the instant action.

Certainly, the State will argue that while the State Court could not consider the claims, it was free to consider the issues underlying the claims. However, such a distinction does not withstand due process scrutiny. The idea that a party is prohibited from raising claims by Rule which claims are then precluded by the determinations made where the claims could not be raised does not provide "a fair opportunity to litigate."

In order for a party to have a fair opportunity to litigate a matter they must either control the litigation or could have or actually did substantially participate in the litigation. *Tungate v. Gardner, 2002 Me. 85, 797 A. 2d 738 (Me. 2002); State v. Hughs, 2004 Me. 141, 863 A. 2d 266 (Me. 2004).* Given that Ms. Miller and Mr. Mahood were compelled to Court by the State's actions making them Defendants in a Preliminary Protection

Petition and then a subsequent Petition for Termination of Parental Rights they did not have control of the litigation.

The remaining question is whether they actually did, or could have substantially participated in the litigation. There is no doubt that Ms. Miller and Mr. Mahood defended themselves in the action by the State. However, it would seem that substantial participation requires more than just defending oneself.

Substantial participation should mean the ability to litigate any claims or causes of action one has against the opposing party. Here, where the Rule prohibited Ms. Miller and Mr. Mahood from raising their current Federal claims in the State court action, it cannot be said they either could have or actually did substantially participate in litigating the issues relating to those claims.

The situation is identical to a §1983 Civil Rights Excessive Force claim during a valid arrest. Just because a Defendant defended himself, including raising the issue of excessive force as evidence of the arresting officer's bias against him in an attempt to undermine the officer's credibility in a robbery claim, for which he was subsequently convicted, does not mean that he had an opportunity to substantially participate in litigation on the excessive force issue. Similarly, defending oneself in a Termination of Parental Rights proceeding by attempting to show bias to attach the credibility of a witness, does not mean that the Plaintiffs were given an opportunity to substantially litigate the issues

underlying their ADA, Section 504, and Federal Civil Rights claim.

E. Neither Kristen Nichols nor Commissioner Harvey were parties to The underlying action

The res judicata doctrine of claim preclusion requires that:

> 1) The parties to the action are the same;
> 2) The facts asserted in the new action are the same as asserted in the previous actions, and;
> 3) The action of the prior tribunal constitutes a final adjudication by a court of competent jurisdiction.
> *Wolf v. Gruntal & Co., Inc 45 F.3d 524 (C.A. 1 Me. 1995); Town of Ogunquit v. Cliff House & Motels, 2000 Me. 169, 759 A. 2d 731 (Me. 2000).*

Issue preclusion has not, doctrinally, required the parties be the underlying action be the same as the current action. However, this Court recently ruled that:

> "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to non-parties thus runs up against the 'deep rooted historic

> tradition that everyone should have his own day in Court.' *Richards, 517 U.S. at 798" Taylor v. Sturgill, U.S. Supreme Court 07-371, June 12, 2008.*

Taylor certainly suggests that the doctrine of issue preclusion can only operate against one who has been a party to the underlying action.

If an entity must be a party to a suit for any issues arising in that action to have a preclusive effect against them, the question then is, must an entity be a party to the action in order to assert issue preclusion? It would seem that the answer must be yes. To do otherwise gives a party the advantage of the best of both worlds. If a decision in a prior proceeding is unfavorable, the party argues that it was not involved in the prior proceeding and is entitled to its own day in Court. If the decision is favorable, the party claims it is entitled to the benefits of the decision of the prior proceeding.

It would seem that if a Defendant can fend off a claim of issue preclusion on the grounds that it has not had a fair opportunity to litigate because it was not involved in the underlying preceding then the obverse should be true as well. A Plaintiff should be able to fend off a claim of issue preclusion by a Defendant, because it has not had a fair opportunity to litigate against these specific parties.

F. The §1983 HIPPA Violations

The Federal District Court dismissed the Plaintiffs' Section 1983 claim on the grounds that the

Plaintiff had admitted that there was no private cause of action for HIPAA violations. A review of the Plaintiffs' brief confirms that the Plaintiffs acknowledged that their preliminary research did not contradict the assertions of the State. HIPAA does not seem to create a private cause of action for HIPPA violations.

However, the Plaintiffs argued then and re-assert now, that it is a well-recognized legal maxim that if the law recognizes a right, it must also recognize a remedy. HIPPA was enacted to ensure that citizens enjoyed a right of privacy in their medical records. While no specific right of privacy exists within the Bill of Rights this Court recognized a privacy right as a penumbra of the Fourth Amendment in *Griswold v. Connecticut, 381 U.S. 479 (1965).*

A claimant states a cause of action under 42 U.S.C. §1983 when they allege that an individual acting under the color of state law alleges a violation of their federally protected rights. In this case, Ms. Miller Miller alleges that HIPAA combined with the Fourth Amendment gave her a constitutionally protected privacy rights in her medical records. When a State actor, Kristen Nichols, disclosed those records, it was a violation of Ms. Miller's rights and should be actionable under §1983.

The need for a private enforcement remedy against a State actor is magnified by the fact that those Ms. Nichols admitted in open Court, in front of two State Assistant Attorney Generals, that she had forwarded unfavorable psychological records concerning Ms. Miller (specifically leaving out any

favorable records of Ms. Miller) to a doctor examining Ms. Miller's daughter for a Vitamin D deficiency, no enforcement action has been taken against Ms. Nichols. Even Ms. Nichols subsequent admission that there was no reason to send any of Ms. Miller's psychological records to her daughter's doctor was not enough to prompt an enforcement action against Ms. Nichols.

In the absence of any State initiated enforcement action against Ms. Nichols it would seem appropriate to permit Ms. Miller to utilize the provisions of Section 1983 to grant a remedy against state actors who violated her privacy rights guaranteed by the Federal HIPAA statute and the penumbras of the Fourth Amendment.

CONCLUSION

For the reasons set forth in this Petition, a Writ of Certiorari should issue to review the judgment and opinion of the First Circuit Court of Appeals.

Respectfully submitted,

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